IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 13, 2008 Session

GARY L. CARROLL v. YUCATAN RESORTS S.A. de C.V., ET AL.

Appeal from the Chancery Court for Knox County
No. 157801-3 Michael W. Moyers, Chancellor

No. E2007-01807-COA-R3-CV - FILED MAY 16, 2008

Gary L. Carroll ("Plaintiff") was a managing agent for Yucatan Resorts, S.A. de C.V., Yucatan Resorts, Inc., Yucatan Investment Corp., and/or Resort Holdings International, Inc. (collectively referred to as the "Yucatan Defendants"). As a managing agent, Plaintiff sold investment opportunities to various clients, including defendant Burl Henderson and his wife, Ruth Henderson. With Plaintiff's assistance and unbeknownst to Mr. Henderson, Ruth Henderson changed the beneficiary on her investments from Mr. Henderson to the Hendersons' only child. Plaintiff claims that after Ruth Henderson died and Mr. Henderson learned that his wife had changed beneficiaries with Plaintiff's assistance, Mr. Henderson contacted various representatives of the Yucatan Defendants with the goal of getting Plaintiff fired. After Plaintiff's contractual relationship with the Yucatan Defendants was terminated, Plaintiff sued Henderson and the Yucatan Defendants. The Trial Court dismissed Plaintiff's claims against Yucatan Resorts, S.A. de C.V. on the basis of ineffective service of process and later entered a monetary judgment against the remaining Yucatan Defendants. The Trial Court also granted Mr. Henderson's motion for summary judgment on Plaintiff's claims for intentional interference with a business relationship and inducement to breach of contract in violation of Tenn. Code Ann. § 47-50-109. Plaintiff appeals. We affirm the dismissal of the lawsuit against Yucatan Resorts, S.A. de C.V., and vacate the grant of summary judgment to Henderson.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated in Part and Affirmed in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Dudley W. Taylor and Jonathan S. Taylor, Knoxville, Tennessee, for the Appellant, Gary L. Carroll.

John W. Dupree, Knoxville, Tennessee, for the Appellee, Burl F. Henderson.

OPINION

Background

In April of 2003, Plaintiff filed suit against Burl Henderson ("Henderson") and the Yucatan Defendants. The primary crux of the claim against the Yucatan Defendants was breach of contract. The primary claim against Henderson involved allegations that Henderson tortiously interfered with a business and/or contractual relationship between Plaintiff and the Yucatan Defendants, and that this tortious interference resulted in the Yucatan Defendants improperly terminating their contractual relationship with Plaintiff. Plaintiff sought, among other things, damages for lost commissions and, as to Henderson, damages pursuant to Tenn. Code Ann. § 47-50-109.[1]

According to the complaint, Plaintiff is a licensed insurance salesman. Plaintiff asserts that sometime in 1999, he became a managing agent for the Yucatan Defendants and began selling what Plaintiff refers to as an "investment program providing for a lucrative return for the investors." The complaint notes that the Yucatan Defendants are affiliated entities owned and/or controlled by Michael Kelly. Plaintiff claims that he and the Yucatan Defendants entered into a Managing General Agent Agreement which provides, among other things, that Plaintiff was "desirous of representing the Company by introducing his qualified clients and/or Sub-Marketers to the Company's Universal Lease Program." The complaint does not go into any detail describing the "Universal Lease Program."[2]

According to Plaintiff, several years ago Henderson and his wife, Ruth Henderson, invested in the Universal Lease Program with the investment primarily being funded by Ms. Henderson. After Ms. Henderson was diagnosed with terminal cancer, Henderson became infatuated with a much younger woman and began giving this other woman expensive gifts. Plaintiff maintains that Ms. Henderson became very concerned that when she passed away, Henderson would give everything to his new paramour. With Plaintiff's assistance, Ms. Henderson's beneficiary on the funds she had invested with the Yucatan Defendants was changed from Henderson to the Hendersons' only child. Plaintiff claims that after Ms. Henderson passed away, Henderson

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[1] Tenn. Code Ann. § 47-50-109 provides:

> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

[2] Although not directly relevant to this appeal, Henderson claims the Universal Lease Program was nothing more than a ponzi scheme. A description of the Universal Lease Program can be found in *United States Sec. and Exch. Comm'n v. Michael E. Kelly, et al.,* No. 07 C 4979, 2008 WL 961268 (N.D. Ill. Apr. 8, 2008).

immediately requested the money in Ms. Henderson's account and that he became enraged when he learned that Ms. Henderson had changed beneficiaries without his knowledge. Plaintiff claims that because he assisted Ms. Henderson with changing beneficiaries, Henderson made phone calls to the Yucatan Defendants trying to get Plaintiff fired and, because of these conversations, Yucatan wrongly terminated its business relationship with Plaintiff.

Henderson filed a motion for summary judgment seeking dismissal of the four claims brought against him. These claims were: 1) conspiracy to defraud; 2) negligent infliction of emotional distress; 3) intentional interference with a business relationship; and 4) inducement to breach of contract in violation of Tenn. Code Ann. § 47-50-109. According to the motion:

> 1. Plaintiff brought his suit against Mr. Henderson alleging conspiracy to defraud, intentional interference with a contractual relationship, intentional interference with business relations and negligent [infliction] of emotional distress;
>
> 2. Plaintiff has no proof that Mr. Henderson engaged in any fraud, misrepresentation or conspiracy;
>
> 3. Plaintiff cannot prove the tort of intentional interference with business relationships and/or tortious inducement to breach a contract because Mr. Henderson never knew about the contract at issue[; and]
>
> 4. Plaintiff cannot show that Mr. Henderson engaged in any outrageous or extreme conduct or that the Plaintiff suffered any severe or serious emotional injury supported by expert medical or scientific evidence. Further, Plaintiff cannot demonstrate that Mr. Henderson breached any duty that resulted in any emotional injury.

In December of 2005, the Trial Court entered an order partially granting Henderson's motion for summary judgment. The Trial Court's order states:

> This Court finds that Defendant Henderson's motion is well-taken in part since there is no sufficient evidence of a severe emotional injury to the Plaintiff and there was no evidence of a conspiracy between Defendant Henderson and any of the rest of the Defendants.…
>
> [S]ummary judgment is granted to Defendant Henderson with regard to Plaintiff's claims of negligent infliction of emotional distress and conspiracy to defraud and said claims are dismissed with prejudice.…
>
> [S]ummary judgment is inappropriate … for the remaining causes of action brought by the Plaintiff against Defendant Henderson and Defendant Henderson's motion is denied in that respect.

Henderson later filed a second motion for summary judgment seeking dismissal of Plaintiff's two remaining claims. In July of 2003, the Trial Court entered an Order granting the second motion.[3] According to the Trial Court:

> This Court finds that Defendant Henderson has met his burden of showing that the Plaintiff cannot establish an essential element of his claim, namely the element of proximate cause for the Plaintiff's termination. Further, the Plaintiff has set forth no specific admissible evidence establishing the existence of disputed, material facts regarding his termination which must be resolved at trial. This Court finds that the Plaintiff's reliance on inadmissible hearsay correspondence is not sufficient to meet his burden. This Court also finds that Plaintiff's reliance upon unanswered Requests [for] Admissions propounded to a Co-Defendant is likewise insufficient to meet his burden.

With regard to the claims against the Yucatan Defendants, defendant Yucatan Resorts S.A. de C.V. filed a motion to dismiss challenging service of process. The remaining Yucatan Defendants filed a motion to dismiss claiming the Trial Court lacked personal jurisdiction over them. The Trial Court eventually dismissed Yucatan Resorts S.A. de C.V. after determining that "service had not been effected in compliance with the Hague Convention." The remaining Yucatan Defendants' motion challenging in personam jurisdiction was denied. After the remaining Yucatan Defendants failed to file any further responsive pleadings, the Trial Court entered a monetary judgment against them.

Plaintiff appeals raising the following issues: (1) Whether the Trial Court erred in granting Henderson's second Motion for Summary Judgment because Henderson failed to negate an essential element of Plaintiff's claims and there are genuine issues of material facts; and (2) Whether the Trial Court erred in dismissing Defendant Yucatan Resorts S.A. de C.V. on the basis of ineffective service of process.

[3] The first motion for summary judgment which was partially denied was ruled upon by Chancellor Sharon Bell. After the ruling on the first motion for summary judgment, Chancellor Bell retired. Henderson's second motion for summary judgment was essentially a motion to reconsider the previous denial of summary judgment on the two remaining claims. When the second motion for summary judgment was filed, Chancellor Michael W. Moyers was presiding over this case.

Discussion

In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330 (Tenn. 2005), our Supreme Court recently reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. The Court stated:

> The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *See Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Teter, 181 S.W.3d at 337.

At the outset, it is important to mention what this appeal does not involve. Plaintiff has not appealed the dismissal of the conspiracy to defraud or negligent infliction of emotional distress claims that were dismissed when the first motion for summary judgment was partially granted. As such, the dismissal of those claims remains intact. Likewise, the monetary judgment entered against most of the Yucatan Defendants has not been appealed and is not at issue here. The only issue as to any of the Yucatan Defendants involves adequacy of service of process on Yucatan Resorts S.A. de C.V. under the Hague Convention. We note that Yucatan Resorts S.A. de C.V. has not filed a brief in this appeal.

We first discuss whether the Trial Court erred when it granted Henderson's motion for summary judgment on Plaintiff's claims for tortious interference with business relations as well as inducement to breach of contract in violation of Tenn. Code Ann. § 47-50-109. In his brief on appeal, Henderson states:

> The Chancellor below did not err in granting Mr. Henderson's Second Motion for Summary Judgment because the Plaintiff could not show that Mr. Henderson's actions were the proximate cause of his alleged termination. The two remaining causes of action were inducing or securing the breach of contract and tortious interference with contractual relations. In order to prevail on these claims, one of

> the elements that the Plaintiff must show is that the defendant's conduct was the proximate cause of the alleged breach of contract.
>
> * * *
>
> In the present case, it is undisputed that Yucatan owed and refused to pay the Plaintiff at least $240,000.00 in earned commissions months before the Plaintiff's termination. Without question Yucatan was predisposed to breach the MGA independent of Mr. Henderson's conduct. In fact, the trial court below already entered judgment against Yucatan for the commissions and other damages finding that Yucatan had not effectively terminated the MGA. Hence, it is impossible for the Plaintiff to show that Mr. Henderson's conduct was the proximate cause for the termination. The Plaintiff cannot, and did not, foreclose other reasons, besides Mr. Henderson's conduct, for the termination. The Plaintiff alleged other reasons that the MGA was breached. Therefore, this Court should find … that the case should have been dismissed for the inability to prove proximate cause and affirm the Chancellor's decision below. (emphasis in the original)

As a second basis in support of the Trial Court's decision, Henderson argues that summary judgment was appropriate because Henderson was not aware that a contract existed between Plaintiff and the Yucatan Defendants, a necessary element of both the interference with a business relationship claim as well as the statutory inducement to breach of contract claim. Henderson further argues that there "is no evidence that Mr. Henderson ever saw the contract, knew about the actual terms of the contract, knew of the intention of the parties to the contract or knew about the commissions allegedly due [Plaintiff]."

In *Mills v. CSX Transp. Inc.,* No. E2006-01933-COA-R3-CV, 2007 WL 2262052 (Tenn. Ct. App. Aug. 8, 2007), *no appl. perm. appeal filed*, this Court discussed the summary judgment standard in some detail, relying heavily on our earlier opinion in *Hannan v. Alltel Pub. Co.*, No. E2006-01353-COA-R3-CV, 2007 WL 208430 (Tenn. Ct. App. Jan. 26, 2007), *perm. app. granted June 18, 2007*. Quoting *Hannan*, we stated:

> [The Tennessee] Supreme Court continues to adhere to the principle that a defendant seeking summary judgment must actually negate an essential element of the plaintiff's claim or establish an affirmative defense before the plaintiff's burden to produce evidence establishing the existence of a genuine issue of material fact is triggered. An assertion that a plaintiff cannot prove an essential element of her claim does not constitute the negating of that element. Hence, it is insufficient to support a grant of summary judgment. *See, e.g., Lawson v. Edgewater Hotels, Inc.*, 167 S.W.3d 816, 823-24 (Tenn.

Ct. App. 2004); *Hankins v. Chevco, Inc.*, 90 S.W.3d 254, 261 (Tenn. Ct. App .2002).

Mills, 2007 WL 2262052, at * 5.

In accordance with the above analysis, in *Mills* we concluded that the trial court improperly granted summary judgment based on the defendant's argument that the plaintiff would be unable to prove his claim at trial. *Id.*, at *6. According to *Mills*:

> Because Defendant failed to affirmatively negate an essential element of Plaintiff's claim or to conclusively establish an affirmative defense, Plaintiff's burden at this summary judgment stage to establish the existence of a genuine issue of material fact never was triggered. *See Blair*, 130 S.W.3d at 767. While Plaintiff may well not be able to meet his burden at trial, his burden at this summary judgment stage is far different. Therefore, the Trial Court erred when it granted Defendant's motion for summary judgment.
>
> Finally, we note that there is a disagreement between the Eastern Section and the Middle Section of this Court regarding the proper standard for evaluating a motion for summary judgment. This disagreement was examined in detail in *Hannan*, 2007 WL 208430, at *7, 8. In short, the two sections are in disagreement over whether it is sufficient, for summary judgment purposes, to claim that a plaintiff will be unable to prove his or her case at trial. We continue to adhere to our decision in *Hannan* that such proof is insufficient under the standard set by *Blair*, and we will continue to do so until instructed otherwise by the Tennessee Supreme Court. We note, however, that our Supreme Court has granted permission to appeal in the *Hannan* case, and, hopefully, this disagreement will be resolved in the near future.

Mills, 2007 WL 2262052, at * 6 (footnote omitted).

Returning to the present case, Henderson's primary argument is that Plaintiff will be unable to prove that Henderson's alleged conduct was the proximate cause of his claimed damages. As we stated in *Hannan* and *Mills*, simply claiming that a party will be unable to prove an essential element of his case is insufficient to support an award of summary judgment.

Next, Henderson argues that summary judgment was appropriate because he was unaware of the existence of the contract as well as the terms of that contract. While this assertion is consistent with Henderson's testimony, it is not consistent with the testimony of Plaintiff. In his affidavit filed in opposition to the motion for summary judgment, Plaintiff stated:

> I did not provide Henderson and his wife with a copy of my Managing General Agent Agreement (the "Agreement"). However, I expressly advised them of my affiliation as an agent with the Kelly Group and further advised that the Agreement provided for compensation to me as a percentage of funds placed with the Kelly Group.
>
> I did not disclose to Henderson and his wife the specific percentage of compensation which I received with respect to these investments, but I did authorize the Kelly Group to pay to Henderson 2% of the commission payable to me with respect to the 2-year renewal. The commission payable to me with respect to Henderson's renewal occurring on or about March 16, 2002, was reduced by this agreed 2% which was paid to Henderson.
>
> In addition to advising Henderson and his wife of my affiliation as an agent with the Kelly Group, this information was disclosed in bold print on the investment paperwork required to be signed by Henderson and his wife and any other investor.

At a minimum, we think the foregoing creates a genuine issue of material fact as to whether Henderson was aware of the existence of a contract between Plaintiff and one or more of the Yucatan Defendants. Henderson did not need to know the various specific terms of the contract in order for Plaintiff to be able to create a genuine issue of material fact on the two causes of action at issue in the second motion for summary judgment.

While we express no opinion on the ultimate merits of Plaintiff's claim, the burden on Plaintiff at this summary judgment stage is "far different" from what it will be at trial. *Mills*, 2007 WL 2262052, at *6. Henderson neither negated an essential element of Plaintiff's claims nor established an affirmative defense. Based on the foregoing, we conclude that the Trial Court erred in granting summary judgment to Henderson on Plaintiff's claims for interference with a business relationship and inducing a breach of Plaintiff's contract. We, therefore, vacate the award of summary judgment to Henderson.

The next issue is whether the Trial Court erred when it dismissed the complaint against Yucatan Resorts S.A. de C.V. based on ineffective service of process. Plaintiff claims a copy of the complaint was sent to this particular Yucatan defendant via registered mail and that it was refused. Plaintiff claims service of process via registered mail is sufficient under the Hague Convention and that this particular defendant should be deemed properly served because it refused to accept lawful service.

In *Basham v. Tillaart*, No. M2002-00723-COA-R3-CV, 2003 WL 21780974 (Tenn. Ct. App. July 31, 2003), *no appl. perm. appeal filed*, this Court observed that "[u]nder the Hague Convention, service of leading process *must be made through the foreign country's designated*

Central Authority. The Hague Convention, Art. 2, 20 U.S.T. 361."[4] *Id*., at *3 (emphasis added). In the present case, Plaintiff does not claim that service was accomplished upon Yucatan Resorts S.A. de C.V. through Mexico's designated Central Authority. Instead, Plaintiff argues, notwithstanding the provisions of Article 2, that Article 10 of the Convention permits service by registered mail. Judge Susano, writing for this Court, rejected the identical argument in *Basham*, stating:

> Plaintiff mistakenly cites Article 10 of the Hague Convention to support his argument that service by direct mail was sufficient. Article 10(a) declares that "provided the State of destination does not object, the present Convention shall not interfere with ... the freedom to send judicial documents, by postal channels, directly to persons abroad ..." (Emphasis added). In citing this provision, plaintiff fails to recognize the distinction between serving original or leading process to properly notify foreign defendants of a pending action on the one hand and the sending of other judicial documents after the initial service of process on the other. *See Bankston*, 889 F.2d at 173; *Wilson*, 776 F. Supp. 341-42; *Wasden*, 131 F.R.D. at 208-09. Many courts have concluded that Article 10(a) "simply provides a method of sending subsequent documents after service of process has been obtained through the Central Authority." *Wilson*, 776 F. Supp. at 341-42; *see also Bankston*, 889 F.2d at 173; *Golub*, 924 F. Supp. at 327; *Gallagher v. Mazda Motor of Am., Inc.*, 781 F. Supp. 1079, 1082 (E.D. Pa. 1992); *Fleming*, 774 F. Supp. at 996; *Wasden*, 131 F.R.D. at 209; *O'Halloran v. Milehouse Inv. Mgmt. Ltd. (In re Greater Ministries Int'l, Inc.)*, 282 B.R. 496, 502-03 (Bankr. M.D. Fla 2002). It is clear that Article 10 does not permit service of leading process by direct mail.

Basham, 2003 WL 21780974, at *4.

In agreement with *Basham*, we conclude that the Trial Court did not err when it determined that Plaintiff had failed to properly serve Yucatan Resorts S.A. de C.V. in accordance with the requirements of the Hague Convention.

Plaintiff's last argument on the service of process issue is his claim that the Trial Court should have permitted him time to properly effectuate service on Yucatan Resorts S.A. de C.V. instead of dismissing the lawsuit against that defendant. This lawsuit originally was filed in April of 2003. The order dismissing Yucatan Resorts S.A. de C.V. was entered three years later in April of 2006. Plaintiff offers no explanation as to why, given these facts, it was error for the Trial

[4] Article 2 provides that "[e]ach Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6. Each State shall organise (sic) the Central Authority in conformity with its own law."

Court not to give him even more time to comply with the requirements of the Hague Convention. Plaintiff had more than sufficient time to serve Yucatan Resorts S.A. de C.V. in a manner consistent with the terms of the Hague Convention. In any event, we cannot conclude that the Trial Court committed reversible error when it did not allow Plaintiff even more time to effectively serve Yucatan Resorts S.A. de C.V.[5] Accordingly, the judgment of the Trial Court with respect to Yucatan Resorts S.A. de C.V. is affirmed.

Conclusion

The judgment of the Trial Court granting summary judgment to Henderson on Plaintiff's claims for interference with a business relationship and inducement to breach of contract is vacated. The Trial Court's judgment dismissing the claim against Yucatan Resorts S.A. de C.V. based on lack of service of process is affirmed. This cause is remanded to the Trial Court for further proceedings consistent with this Opinion, and for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Gary L. Carroll, and his surety, and one-half to the Appellee, Burl F. Henderson.

D. MICHAEL SWINEY, JUDGE

[5] While this appeal was pending, Plaintiff filed a motion asking this Court to consider post-judgment facts. Because the "facts" Plaintiff asks us to consider pertain to a different lawsuit involving Plaintiff and Yucatan Resorts S.A. de C.V., we deny the motion.